Supreme Court, U.S.
FILED
DEC 15 2000

No.

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

DETNAKONE PHETSANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1231(a)(1) of Title 8 of the United States Code provides that when an alien has been ordered removed from the United States, the Attorney General shall remove the alien within 90 days. Section 1231(a)(2) requires the detention during the 90-day removal period of aliens who have been found removable based on a conviction for an aggravated felony. Section 1231(a)(6) then provides, in relevant part, that an alien who is removable for having committed an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The question presented is:

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review.

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In the Supreme Court of the United States

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DETNAKONE PHETSANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service (INS), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The orders of the court of appeals (App., *infra*, 1a-2a) and the district court (App., *infra*, 3a-4a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1231(a) of Title 8 of the United States Code provides in relevant part:

> **Detention and removal of aliens ordered removed**
>
> **(a) Detention, release, and removal of aliens ordered removed**
>
> **(1) Removal period**
>
> **(A) In general**
>
> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
>
> * * * * *
>
> **(2) Detention**
>
> During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.
>
> **(3) Supervision after 90-day period**
>
> If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under

regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a) (Supp. IV 1998).

STATEMENT

1. a. Respondent is a native and citizen of Laos. Alien file A23894667 (A-file). He entered the United States as a refugee with legal permanent residence status on February 19, 1980. *Id.* at 9, 57.

On February 26, 1998, the INS served respondent with a notice to appear, charging respondent with being subject to removal from the United States under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998), because he had been convicted of an aggravated felony. A-file 9. The charge was based on respondent's conviction in state court on August 14, 1992, of attempted murder with premeditation. *Id.* at 9, 59. Respondent had been sentenced to a total of 11 years' imprisonment, which included a four-year sentence enhancement for having used a firearm in the commission of the offense. *Id.* at 59-61.

Respondent's attempted murder conviction arose out of a two-count indictment that also charged respondent with kidnaping. A-file 61. Respondent has provided the INS with varying accounts of the offense. On one occasion, respondent explained that, at the time of the offense, he was a gang member. *Id.* at 46. He and fellow gang members drove into the neighborhood of another gang and opened fire at rival gang members. *Ibid.* Respondent stated that the police arrested him for the shooting after his friends "ratted [him] out." *Ibid.* On another occasion, respondent denied gang membership and stated that he took some friends to a liquor store that happened to be in the neighborhood of a rival gang. 3/5/99 Criminal Alien Review Sheet 3. Respondent stated that, as they were returning from the store, they happened to see a party and decided to go to it. Respondent claimed that, as they were leaving

the party, a man came out and started shooting and one of his friends shot the man. *Ibid.* Respondent further claimed that he turned himself in after he learned that the police were looking for him. Further questioning revealed, however, that respondent had first fled to another state for approximately two months. *Ibid.* On yet another occasion, respondent provided a version similar to the second account, but admitted gang involvement. 10/20/99 Post Order Custody Review Worksheet 4. Respondent also was previously convicted of misdemeanor burglary. A-file 77; 3/5/99 Criminal Alien Review Sheet 3. Respondent also has a long history of arrests, the disposition of which is not reflected in the record. A-file 68-69, 75-77 (the charges included second degree burglary, providing false identification to a peace officer, attempted burglary, possession of burglary tools, carrying a concealed weapon in a vehicle, carrying a loaded firearm in a public place, receiving stolen property, and attempted theft of a vehicle).

While respondent was serving his state sentence, the INS issued a detainer against him, A-file 85, and, on February 25, 1998, respondent was transferred to the custody of the INS. *Id.* at 44.

b. On March 16, 1998 an immigration judge found that respondent was subject to removal as charged. A-file 2. The immigration judge denied respondent's applications for asylum, withholding of removal, and cancellation of removal, because respondent's conviction of an aggravated felony for which he was sentenced to more than five years' imprisonment rendered him ineligible for such relief. *Ibid.* The immigration judge ordered respondent removed to France, which was the country designated by respondent, and, in the alternative, to Laos if France refused to admit him. *Ibid.*

Respondent did not appeal the immigration judge's order to the Board of Immigration Appeals, and thus his removal order became final. App., *infra*, 3a; A-file 1.

c. On March 18, 1998, the INS requested travel documents for respondent from the consulate of France. A-file 42-43. The French government refused to permit respondent to enter France. *Ibid.* The INS has been unable to effectuate respondent's removal to Laos. See App., *infra*, 3a.

d. The INS continued to detain respondent under 8 U.S.C. 1231(a)(6) (Supp. IV 1998), subject to periodic administrative review of his custody. In May 1998, the INS conducted a review of respondent's custody status. A-file 44-48. After interviewing respondent and reviewing his file, the INS interviewing officials recommended that respondent remain in INS custody because of the threat to the community he would pose if released. *Id.* at 47. In March 1999, the INS conducted a review of respondent's custody status, which included an interview of respondent, who had the assistance of counsel. 3/5/99 Criminal Alien Review Sheet. The INS determined that respondent should be continued in INS detention, citing respondent's past violent conduct, his use of a gun, his simple denial of culpability for the offense without offering any convincing evidence about the incident, his failure to accept responsibility for his actions, and his failure to begin the rehabilitation process. *Id.* at 4. On October 20, 1999, the INS conducted a review of respondent's custody status, which included an interview of respondent, who had the assistance of counsel. 10/20/99 Post Order Custody Review Worksheet 2. On November 17, 1999, the INS informed respondent that he would be continued in INS detention and his custody would be reviewed in six months. 11/16/99 Decision to Continue Detention Following

Interview. An INS headquarters review panel reviewed that custody decision and agreed with the determination to continue respondent in custody. 1/13/00 Headquarters Post Order Custody Review 1-2. Citing the seriousness of respondent's attempted murder conviction, his gang membership, his 13 disciplinary violations during the preceding 18 months in custody, his intent to return to the same environment that he was in before his convictions, and his refusal to take responsibility for his criminal actions and disciplinary infractions, the headquarters review panel could not conclude that respondent was unlikely to pose a threat to the community or a flight risk if released. *Ibid.*; 4/3/00 Decision to Continue Detention Following Interview 1-2.

2. a. Meanwhile, on August 31, 1998, respondent had filed a petition for habeas corpus relief under 28 U.S.C. 2241 in the United States District Court for the Eastern District of California, challenging the constitutionality of his continued detention. App., *infra*, 3a.

b. On April 10, 2000, the Ninth Circuit issued its decision in *Ma* v. *Reno*, 208 F.3d 815, holding that the INS lacked authority as a statutory matter under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain an alien beyond the initial 90-day removal period described in 8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998), notwithstanding that the Attorney General had continued to detain the alien because he posed a risk to the community, the alien's detention was subject to periodic administrative review, and the country to which the alien was ordered removed (Cambodia) is engaged in ongoing negotiations with the United States concerning a process for the return of its nationals ordered removed by the INS. The Ninth Circuit in *Ma* did not reach the constitutional grounds on which the district court had relied.

c. On May 12, 2000, the district court entered an order in this case granting respondent's habeas corpus petition and directing the INS to release respondent from custody subject to reasonable restrictions. App., *infra*, 4a. The district court summarily ruled that, under the court of appeals' decision in *Ma*, respondent was entitled to habeas corpus relief. *Id.* at 3a-4a.

d. On September 18, 2000, the court of appeals entered an order summarily affirming the district court's judgment in this case on the basis of its decision in *Ma*. App., *infra*, 1a-2a.

ARGUMENT

This case presents the question whether the Attorney General is authorized to continue to detain an alien beyond the initial 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the United States but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review. The court of appeals summarily affirmed the judgment of the district court in light of its holding in *Ma* v. *Reno*, 208 F.3d 815 (9th Cir. 2000), that the INS lacks such authority.

On October 10, 2000, this Court granted the petition for a writ of certiorari in *Reno* v. *Ma*, 121 S. Ct. 297, to review that decision of the Ninth Circuit. On the same date, the Court also granted the petition for a writ of certiorari in *Zadvydas* v. *Underdown*, 121 S. Ct. 297, to review a decision of the Fifth Circuit (185 F.3d 279 (1999)) that rejected a constitutional challenge to continued detention under Section 1231(a)(6), without questioning the statutory authority of the Attorney General to detain an alien in such circumstances.

Because the question presented in this case is already before the Court in *Ma* and *Zadvydas*, the petition for a writ of certiorari should be held pending the Court's decisions in those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Reno* v. *Ma*, No. 00-38, and *Zadvydas* v. *Underdown*, No. 99-7791, and then be disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16286
DC# CV-98-1669-DFL
Eastern California (Sacramento)

DETNAKONE PHETSANY, PETITIONER-APPELLEE

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLANT

[Filed: Sept. 18, 2000]

ORDER

Before: WALLACE, BEEZER and FERNANDEZ, Circuit Judges

Appellant's renewed motion to stay proceedings in this appeal is denied.

A review of appellant's response to this court's August 11, 2000, order to show cause indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3086 (U.S. July 5, 2000) (No. 00-38); *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam).

Accordingly, we summarily affirm the district court's judgment.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-98-1669 DFL

DETNAKONE PHETSANY, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed: May 12, 2000]

ORDER

Petitioner is an individual in the custody of the Immigration and Naturalization Service (INS) proceeding through counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.

Petitioner is a former lawful permanent resident who was ordered deported to Laos. This order became final on March 16, 1998. Petitioner has not been deported, but instead has remained in INS custody beyond the 90 day "removal period" set out in 8 U.S.C. § 1231, because the United States has no functioning repatriation agreement with Laos, and the Laotian government does not presently accept the return of its nationals from the United States.

On April 10, 2000, the United States Court of Appeals for the Ninth Circuit issued its decision in *Ma v. Reno*, No. 99-35976 (9th Cir. April 10, 2000). In that

decision, the Court held that:

> the INS lacks authority under the immigration laws, and in particular under 8 U.S.C. § 1231(a)(6), to detain an alien who has entered the United States for more than a reasonable time beyond the normal ninety day statutory period authorized for removal. More specifically, in cases like Ma's, in which there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future, we hold that it may not detain the alien beyond that statutory removal period.

Id., slip op. at 3964. Under *Ma v. Reno*, Petitioner is entitled to habeas relief.

Accordingly, IT IS HEREBY ORDERED that:

1. Petitioner's application for a writ of habeas corpus is granted;

2. Respondent's request for a stay of release of Petitioner pending the Ninth Circuit's vote on whether to hear *Ma v. Reno en banc* is denied;

3. Respondent shall release Petitioner from incarceration, subject to such reasonable restrictions set forth in 8 U.S.C. § 1231(a)(3) that the Attorney General may place on Petitioner, as soon as possible. Respondent must release petitioner no later than 4:00 p.m. on May 12, 2000.

Dated: May 10, 2000.

/s/ DAVID F. LEVI
HON. DAVID F. LEVI
United States District
Judge

ORIGINAL No. 00-986 ORIGINAL

Supreme Court, U.S.
FILED
MAR 8 2001
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IN THE SUPREME COURT OF THE UNITED STATES

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

DETNAKONE PHETSANY
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONSE BY RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

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No. 00-986

IN THE SUPREME COURT OF THE UNITED STATES

IMMIGRATION AND NATURALIZATION SERVICE,
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v.

DETNAKONE PHETSANY
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ON PETITION FOR A WRIT OF CERTIORARI
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QUESTION PRESENTED FOR REVIEW

Whether, under 8 U.S.C. §1231(a)(6), the Attorney General has the statutory authority to indefinitely detain a long-time resident alien of the United States beyond the 90-day removal period even if the deportation order cannot be effectuated in the reasonably foreseeable future.

Whether, if the Attorney General has the statutory authority to detain a long-time resident alien of the United States without time limitation under U.S.C. §1231(a)(6), that provision violates Detnakone Petsany's Fifth Amendment Due Process rights because his deportation cannot be effectuated in the reasonably foreseeable future and, even if his deportation was foreseeable, his detention for dangerousness alone is unconstitutional.[1]

---

[1]Neither the District Court, nor the Court of Appeal reached the due process issue raised by Petitioner.

No. 00-986

IN THE SUPREME COURT OF THE UNITED STATES

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

DETNAKONE PHETSANY
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONSE BY RESPONDENT TO PETITION FOR A
WRIT OF CERTIORARI

OPINIONS BELOW

The petition for *certiorari* correctly cites to the unreported district court and Court of Appeals opinions below. App. to Pet. for Cert. 1a - 4a.

STATUTORY, REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The petition for *certiorari* correctly cites the statutory and regulatory provisions involved in the case, 8 U.S.C. §1231(a)(6), 8 C.F.R §241.4, and § 1231(a)(3). The additional statutory provision governing Mr. Phetsany's release is 8 U.S.C. §1253(b) which provides:

> An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 1231(a)(3) of this

title or knowingly give false information in response to an inquiry under such section shall be fined not more than $ 1,000 or imprisoned for not more than one year, or both.

The constitutional provision involved is the Fifth Amendment Due Process Clause which provides, in relevant part: "No person shall ... be deprived of life, liberty or property, without due process of law[.]"

STATEMENT

The lower court opinions correctly set forth the facts of the case and the procedural background. App to Pet. for Cert. 1a - 4a.

By writ of habeas corpus, Mr. Phetsany challenged on statutory and federal constitutional grounds, his ongoing detention by the INS because his deportation order cannot be effectuated in the reasonable foreseeable future, if ever. Both of the lower courts ruled in Mr. Phetsany's favor, and Mr. Phetsany was released from detention into INS supervision in May, 2000. The Court of Appeals summarily affirmed the grant of Mr. Phetsany's writ of habeas corpus based on the circuit's decision in *Ma v. Reno*, 208 F.3d 815 (9th Cir.) *Pet. reh'g denied* (June 2, 2000), *cert. granted*, 121 S. Ct. 297, 69 USLW 3086 (U.S. Oct. 10, 2000) (No. 00-38). In light of the grant of *certiorari* in *Ma*, Mr. Phetsany waived his right to file a Brief in Opposition. On February 8, 2001 a response to the Petition of Certiorari was requested by this Court.

ARGUMENT

The questions presented by this case are whether the Attorney General has the statutory authority to detain a long-time resident alien of the United States whose deportation order cannot be effectuated in the reasonably foreseeable future, if ever, and if so, whether that detention runs afoul of Mr. Phetsany's substantive and procedural due process rights under the Fifth Amendment of the United States Constitution. These same

issues are presented in *Ma v. Reno, supra*, and *Zadvydas* v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297, 69 USLW 324, 69 USLW 3257 (U.S. Oct. 10, 2000) (No. 99-7791), in which the Court granted *certiorari* on October 10, 2000 and heard oral argument on February 21, 2001.

Accordingly, Mr. Phetsany does not waive any objections to the government's recitation of the proper legal analysis in his case, however, because Mr. Phetsany has been released from detention, he agrees with the government that consideration of the government's petition in this case should be held pending the Court's decision in *Ma* and *Zadvydas*.

CONCLUSION

The petitioner's petition for *certiorari* should be held pending this Court's decision in *Reno v. Ma*, No. 00-38, and *Zadvydas v. Underdown*, No. 99-7791, and then affirmed or remanded as appropriate in light of the decisions in those cases.

Respectfully submitted,

Linda Harter
Assistant Federal Defender

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March 7, 2001

No. 00-986

IN THE SUPREME COURT OF THE UNITED STATES

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

DETNAKONE PHETSANY,
Respondent,

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent Detnakone Phetsany, pursuant to Supreme Court Rule 39 and 18 U.S.C. § 3006A(7), asks leave to file his response by Respondent to Petition for Writ of *Certiorari* to the United States Supreme Court without prepayment of costs, and to proceed *in forma pauperis.*

On September 22, 1998, the Federal Public Defender for the Eastern District of California was appointed by the United States District Court for the Eastern District of California to represent Detnakone Phetsany in the underlying civil case and on appeal to the Ninth Circuit Court of Appeals. This appointment was made pursuant to the Criminal Justice Act, 18 U.S.C. §3006A(a)(2)(b).

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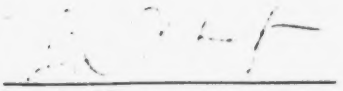
///

///

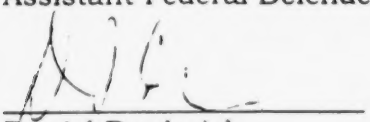
WHEREFORE, the respondent, by and through the undersigned, respectfully prays for leave to proceed in the Supreme Court of the United States *in forma pauperis*.

DATED this 7th day of March, 2001.

Respectfully submitted,



Linda Harter
Assistant Federal Defender



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CERTIFICATE OF SERVICE

IN THE SUPREME COURT OF THE UNITED STATES

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

DETNAKONE PHETSANY,
Respondent,

I, Linda Harter, being first duly sworn, deposes and say:

On March 7, 2001, I, a member of the Bar of this Court, caused the **Response by Respondent to Petition for Writ of Certiorari and the Motion for Leave to Proceed in Forma Pauperis** to be served on all parties required to be served in compliance with Supreme Court Rule 29.3, by depositing the documents, first-class postage prepaid, in a United States mailbox on March 7, 2001, addressed to counsel as follows:

Continued on next page

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Served pursuant to Rule 29.4(a) & 29.5(b)

DATED: March 7, 2001

Linda Harter